

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GARY E. HAWES,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

3:08-cv-00242-ECR-RAM

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by Gary E. Hawes, a Nevada state prisoner. This matter comes before the Court on the merits of the petition.

I. Procedural History

Petitioner was convicted, pursuant to a jury verdict, of one count of sexual assault and one count of battery. (Exhibits 53 & 55).¹ On October 9, 2002, petitioner was adjudicated a habitual criminal and sentenced petitioner to serve a prison term of life without the possibility of parole for the sexual assault, and a concurrent jail term of six months for the battery. (Exhibits 59, 60, 61). Petitioner filed a direct appeal from the judgment of conviction. (Exhibit 64). On January 28, 2004, the Nevada Supreme Court affirmed the judgment of the district court and remanded the matter for

¹ The exhibits referenced in this order are found in the Court's record at ECF Nos. 18-24.

1 the limited purpose of correcting the judgment of conviction. (Exhibit 94). On February 11, 2004,
2 the state district court filed an amended judgment of conviction. (Exhibit 97). Remittitur issued on
3 February 24, 2004. (Exhibit 99).

4 On July 22, 2004, petitioner filed a post-conviction habeas petition in state district court.
5 (Exhibit 102). On August 29, 2005, petitioner filed a supplement to the state habeas petition.
6 (Exhibit 114). On October 10, 2005, the state district court entered an order granting an evidentiary
7 hearing on the first two claims of his state petition, that he received ineffective assistance of counsel
8 in preparing for trial and on appeal. (Exhibit 119). On May 24, 2006, the state district court held an
9 evidentiary hearing. (Exhibit 127). On April 4, 2007, the state district court entered findings of fact,
10 conclusions of law, and an order denying the state habeas petition. (Exhibit 133).

11 Petitioner appealed from the denial of his post-conviction state habeas petition. (Exhibit
12 134). On March 5, 2008, the Nevada Supreme Court affirmed the denial of petitioner's state habeas
13 petition. (Exhibit 147). Remittitur issued on April 1, 2008. (Exhibit 149).

14 Petitioner dispatched his federal habeas petition to this Court on April 29, 2008. (ECF No.
15 6). Respondents have filed an answer. (ECF No. 16). Petitioner filed a motion for the appointment
16 of counsel on April 4, 2011. (ECF No. 26).

17 **II. Motion for Appointment of Counsel (ECF No. 26)**

18 Petitioner has filed a motion for the appointment of counsel. (ECF No. 26). There is no
19 constitutional right to appointed counsel for a federal habeas corpus proceeding. *Pennsylvania v.*
20 *Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993). The
21 decision to appoint counsel is generally discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th
22 Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.),
23 *cert. denied*, 469 U.S. 838 (1984). The petition on file in this action is well-written and sufficiently
24 clear in presenting the issues that petitioner wishes to bring. The issues in this case are not complex.
25 Counsel is not justified in this instance. The motion for appointment of counsel is denied.

1 **III. Federal Habeas Corpus Standards**

2 The Antiterrorism and Effective Death Penalty Act (“AEDPA”), at 28 U.S.C. § 2254(d),
3 provides the legal standard for the Court’s consideration of this habeas petition:

4 An application for a writ of habeas corpus on behalf of a person
5 in custody pursuant to the judgment of a State court shall not be
6 granted with respect to any claim that was adjudicated on the merits in
7 State court proceedings unless the adjudication of the claim –

8 (1) resulted in a decision that was contrary to, or involved an
9 unreasonable application of, clearly established Federal law, as
10 determined by the Supreme Court of the United States; or

11 (2) resulted in a decision that was based on an unreasonable
12 determination of the facts in light of the evidence presented in the State
13 court proceeding.

14 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications
15 in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect
16 to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court
17 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C.
18 § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme
19 Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from
20 a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme
21 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529
22 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

23 A state court decision is an unreasonable application of clearly established Supreme Court
24 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct
25 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
26 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,
529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more

1 than merely incorrect or erroneous; the state court's application of clearly established federal law
2 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

3 In determining whether a state court decision is contrary to, or an unreasonable application of
4 federal law, this Court looks to the state courts' last reasoned decision. *See Ylst v. Nunnemaker*, 501
5 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000), *cert.*
6 *denied*, 534 U.S. 944 (2001). Moreover, "a determination of a factual issue made by a State court
7 shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the
8 presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

9 **IV. Discussion**

10 **A. Ground One**

11 In Ground One of the federal petition, petitioner states: "See attached opening brief and
12 ground on direct appeal from judgment of conviction." (Petition, ECF No. 6, at p. 3). In the opening
13 brief, petitioner claims that he should have had a new sentencing hearing because, following his
14 convictions for sexual assault and battery, he was adjudicated a habitual criminal and sentenced to
15 life in prison without the possibility of parole. Petitioner claims that the sentencing court abused its
16 discretion by failing to dismiss counts brought under the habitual criminal statute. Petitioner admits
17 that he has the requisite number of convictions, but that his counsel argued that the prior convictions
18 were more than twelve years old and were based on impulsive acts by his client. Petitioner argues
19 that his sentence should have been restructured to allow him the opportunity for parole. Petitioner
20 further contends that he is entitled to a new sentencing hearing conducted before a jury, because the
21 procedure in place for habitual criminal adjudication violated *Apprendi v. New Jersey*, 530 U.S. 466
22 (2000).

23 The state district court adjudicated petitioner a habitual criminal and sentenced him to serve a
24 prison term of life without the possibility of parole for sexual assault, and a concurrent jail term of
25 six months for battery. (Exhibits 59, 60, 61). The Nevada Supreme Court considered and rejected
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petitioner's claim on direct appeal, finding that the state district court did not abuse its discretion in adjudicating him as a habitual criminal and sentencing him to a term of life without the possibility of parole. (Exhibit 94). As discussed *infra*, in this Court's analysis of Ground Three, the Nevada Supreme Court held, on direct appeal, that the sentence imposed on petitioner was within statutory limits and was not grossly disproportionate to the crimes for which petitioner was convicted. (Exhibit 94). Petitioner's sentencing was not a violation of his Eighth Amendment protections against cruel and unusual punishment. The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

As discussed *infra*, in this Court's analysis of Ground Five, petitioner's claim that his sentencing violated *Apprendi v. New Jersey* was procedurally defaulted in state court on independent and adequate state grounds. (Exhibit 147, at p. 14). Petitioner demonstrated no cause and prejudice to excuse the procedural default, therefore the claim is procedurally barred from review in this Court.

Even if this Court reached the merits of the *Apprendi* claim, petitioner's arguments would fail. After finding that petitioner's *Apprendi* claim was procedurally barred by NRS 34.810(b)(2), the Nevada Supreme Court, in an alternate holding, went on to reject the claim, as follows:

Moreover, as a separate and independent ground to deny appellant's claim, this claim lacked merit. As this Court recently noted in O'Neill v. State, NRS 207.010 comports with [*Apprendi*] because NRS 207.010 does not require the district court to find any facts beyond prior convictions before sentencing a defendant as a habitual criminal. In O'Neill, this court held that the only discretionary aspect of NRS 207.010 relates to the discretion to dismiss a count, which does not serve to increase punishment; thus, the district court could sentence appellant as a habitual criminal without submission of the issue before a jury upon presentation and proof of the requisite number of convictions. Here, appellant had five prior felony convictions. Therefore, the district court did not err in denying appellant's claim.

(Exhibit 147, at p. 14) (footnotes and citations omitted).

1 The Nevada Supreme Court's rejection of this claim was neither contrary to nor an
2 unreasonable application of *Apprendi*. In *Almendarez-Torrez v. United States*, 523 U.S. 224 (1998),
3 the United States Supreme Court held that a sentencing court may enhance a sentence on the basis of
4 prior convictions even if the fact of those convictions was not found by a jury. *Apprendi* did not
5 overrule *Almendarez-Torrez*. The Ninth Circuit has repeatedly held that *Almendarez-Torrez* remains
6 binding law until explicitly overruled by the Supreme Court. See *United States v. Martinez-*
7 *Rodriguez*, 472 F.3d 1087, 1092-93 (9th Cir. 2007); *United States v. Weiland*, 420 F.3d 1062, 1079
8 n.6 (9th Cir. 2005); *United States v. Reyes-Pacheco*, 248 F.3d 942, 944-45 (9th Cir. 2001); *United*
9 *States v. Pacheco-Zepeda*, 234 F.3d 411, 413-14 (9th Cir. 2000). There is no clearly established
10 federal law, as determined by the United States Supreme Court, that requires petitioner to have been
11 provided a jury to determine whether he should have been adjudicated a habitual criminal under
12 Nevada's habitual criminal statute. Petitioner has failed to meet his burden of proving that the
13 Nevada Supreme Court's decision was contrary to, or involved an unreasonable application of,
14 clearly established federal law, as determined by the United States Supreme Court, or that it was
15 based on an unreasonable determination of the facts in light of the evidence presented in the state
16 court proceeding. As such, petitioner is not entitled to habeas relief on this claim.

17 **B. Ground Two**

18 In Ground Two, petitioner presents allegations that his trial and appellate counsel were
19 ineffective in various ways. Ineffective assistance of counsel claims are governed by the two-part
20 test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court
21 held that a petitioner claiming ineffective assistance of counsel has the burden of demonstrating that
22 (1) the attorney made errors so serious that he or she was not functioning as the "counsel" guaranteed
23 by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense. *Williams v.*
24 *Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687). To establish
25 ineffectiveness, the defendant must show that counsel's representation fell below an objective
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1 standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there is a
2 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
3 would have been different. *Id.* A reasonable probability is "probability sufficient to undermine
4 confidence in the outcome." *Id.* Additionally, any review of the attorney's performance must be
5 "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in
6 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's
7 burden to overcome the presumption that counsel's actions might be considered sound trial strategy.
8 *Id.*

9 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
10 performance of counsel resulting in prejudice, "with performance being measured against an
11 'objective standard of reasonableness,' . . . 'under prevailing professional norms.'" *Rompilla v.*
12 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an
13 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary
14 to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1,
15 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of
16 reasonable professional assistance. *Id.*

17 **1. Ground Two (1)**

18 Petitioner claims that his trial counsel were ineffective because they failed to interview
19 exculpatory witnesses. The Nevada Supreme Court considered and rejected petitioner's claim on
20 appeal, as follows:

21 First, appellant claimed that his trial counsel was ineffective for failing
22 to conduct interviews with potential exculpatory witnesses. Appellant
23 failed to demonstrate that trial counsel's performance was deficient. In
24 his petition, appellant argued that these witnesses would have
25 established that the victim was promiscuous, that the State's witness,
26 Timmy Ahern, had previously made false allegations against
appellant's brother and that he and Ahern had fought over these
allegations, and that Robert Myers was the third person who was
present at Grog's Bar and Grill, the 7-11 store, and the storage shed
where the rape occurred. At the evidentiary hearing, however,

1 appellant failed to produce any witnesses who would attest that they
2 would have testified consistently with appellant's claims. Thus,
3 appellant failed to demonstrate that his counsel was ineffective for
 failing to investigate these witnesses. Therefore, the district court did
 not err in denying this claim.

4 (Exhibit 147, at pp. 2-3) (footnotes and citations omitted). The Nevada Supreme Court cited to and
5 applied the correct federal standard for ineffective assistance of counsel, *Strickland v. Washington*,
6 466 U.S. 668 (1984). (Exhibit 147, at p. 2, n.3). The Nevada Supreme Court denied relief, finding
7 that petitioner failed to demonstrate that his counsel was deficient and failed to demonstrate that he
8 was prejudiced by trial counsel's alleged error. The factual findings of the state court are presumed
9 correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state
10 court's ruling was contrary to, or involved an unreasonable application of, clearly established federal
11 law, as determined by the United States Supreme Court, or that the ruling was based on an
12 unreasonable determination of the facts in light of the evidence presented in the state court
13 proceeding. This Court denies habeas relief as to Ground Two (1).

14 **2. Ground Two (2)**

15 Petitioner claims that his counsel failed to adequately review and investigate his case. The
16 Nevada Supreme Court considered and rejected petitioner's claim on appeal, as follows:

17 Second, appellant claimed that his trial counsel was ineffective for
18 failing to adequately investigate and review his case. Specifically,
19 appellant complained that his counsel failed to take pictures of the
20 wound appellant allegedly received when he was hit with a crow bar
21 during a skirmish with the victim's boyfriend at the storage shed where
22 the sexual assault occurred. Appellant failed to demonstrate that trial
23 counsel's performance was deficient. Appellant failed to present any
 witnesses to verify that the alleged wound on his arm was the result of
 an injury sustained in a fight with a third party on the evening of April
 24, 2001. Thus, appellant's trial counsel was not ineffective for failing
 to photograph the wound because there was no proof that the wound
 was related to the events at issue in this case. Therefore, the district
 court did not err in denying this claim.

24 Third, appellant claimed that his trial counsel was ineffective for
25 failing to examine and photograph the crime scene in order to find
26 potential exculpatory evidence. Appellant failed to demonstrate that
 his trial counsel's performance was deficient or that he was prejudiced.

1 Appellant failed to allege what information such an investigation
2 would have yielded or how that information would have affected the
3 outcome of the trial. Therefore, the district court did not err in denying
4 this claim.

5 (Exhibit 147, at pp. 3-4) (footnotes and citations omitted). The Nevada Supreme Court also rejected
6 petitioner's claim that trial counsel was ineffective for failing to have an independent DNA analysis
7 of the victim's clothing, finding that petitioner did not demonstrate that a DNA analysis would have
8 affected the outcome of the case. (Exhibit 147, at p. 4). The Court further rejected petitioner's claim
9 that trial counsel was ineffective for failing to investigate the sizes of clothing found at the scene and
10 compare them to the size of the victim. (*Id.*). Finally, the Nevada Supreme Court rejected
11 petitioner's argument that trial counsel was ineffective for failing to investigate why the Sexual
12 Assault Response Team (SART) nurse Annette Titus' initial report indicated that no trauma to the
13 vaginal area occurred, but during trial, photographs were admitted which indicate that tearing of the
14 vaginal area did occur. (*Id.*, at p. 5). The Court found that petitioner's counsel extensively
15 questioned Titus about her report on cross examination, and petitioner "failed to demonstrate that
16 further inquiry would have a reasonable probability of altering the outcome at trial." (*Id.*).
17 The Nevada Supreme Court denied relief as to each of petitioner's claims that his counsel was
18 ineffective for failing to properly investigate the case. The Court found that petitioner failed to
19 demonstrate that his counsel was deficient and failed to demonstrate that he was prejudiced by trial
20 counsel's alleged errors. The factual findings of the state court are presumed correct. 28 U.S.C. §
21 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was
22 contrary to, or involved an unreasonable application of, clearly established federal law, as
23 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
24 determination of the facts in light of the evidence presented in the state court proceeding. This Court
25 denies habeas relief as to Ground Two (2).

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1 **3. Ground Two (3)**

2 Petitioner claims that his counsel failed to use expert witnesses for the purpose of
3 contradicting the prosecution's witnesses. The Nevada Supreme Court considered and rejected
4 petitioner's claim on appeal, as follows:

5 Seventh, appellant claimed that his trial counsel was ineffective for
6 failing to utilize any expert witnesses to contradict testimony given by
7 the prosecution's expert witness, including an expert on DNA.
8 Appellant failed to demonstrate that trial counsel's performance was
9 deficient. In his petition, and at the evidentiary hearing, appellant
10 failed to indicate what testimony such an expert would have offered if
11 called to testify. Therefore, the district court did not err in denying this
12 claim.

13 (Exhibit 147, at pp. 5-6) (footnotes and citations omitted). The Nevada Supreme Court denied relief,
14 finding that petitioner failed to demonstrate that his counsel was deficient and failed to demonstrate
15 that he was prejudiced by trial counsel's alleged error. The factual findings of the state court are
16 presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that
17 the state court's ruling was contrary to, or involved an unreasonable application of, clearly
18 established federal law, as determined by the United States Supreme Court, or that the ruling was
19 based on an unreasonable determination of the facts in light of the evidence presented in the state
20 court proceeding. This Court denies habeas relief as to Ground Two (3).

21 **4. Ground Two (4)**

22 Petitioner claims that his counsel did not file any pretrial motions to suppress evidence.
23 Petitioner claims that the search warrant for the shed had been improperly signed and was thus
24 invalid. Petitioner also claims that his counsel failed to file a motion to suppress his statement given
25 to Detective Salter because he claims that he told Salter that he would not sign anything without an
26 attorney being present, yet Salter continued to question him.

 The Nevada Supreme Court considered and rejected petitioner's claim on appeal, as follows:

 Tenth, appellant claimed that trial counsel was ineffective for failing to
file any pre-trial motions to suppress evidence on appellant's behalf.
Specifically, appellant complained that the search warrant was invalid

1 and his counsel should have filed a motion to suppress evidence
2 garnered from the crime scene because the judicial officer who signed
3 the warrant initially signed it on the incorrect page. Appellant failed to
4 demonstrate that trial counsel's performance was deficient or that he
5 was prejudiced. Contrary to appellant's claims otherwise, appellant's
6 trial counsel filed a motion to suppress the evidence found at the crime
7 scene on the basis that the search warrant was invalid. The district
8 court denied that motion on the ground that appellant lacked standing
9 to bring the motion, because he did not have an ownership interest in
10 either the shed or the vehicle and because he did not have a legitimate
11 expectation of privacy in the shed or the vehicle. Therefore, the
12 district court did not err in denying this claim.

13 Eleventh, appellant claimed that his trial counsel was ineffective for
14 withdrawing a motion to suppress a statement appellant made to
15 Detective Alan Salter, of the Reno Police Department. Appellant
16 failed to demonstrate that trial counsel's performance was deficient.
17 Although the district court had granted the motion to suppress as to a
18 portion of the statement that was exculpatory and beneficial to
19 appellant, appellant's trial counsel testified that he withdrew the
20 motion so that the exculpatory portion of the statement could be
21 presented to the jury. Appellant's trial counsel testified that it was not
22 strategically sound to produce this exculpatory evidence through
23 appellant's own testimony because appellant's credibility was
24 susceptible to attack through the admission of appellant's prior felony
25 convictions. Appellant's trial counsel testified that the admission of
26 the statement allowed him to present appellant's theory of the defense
without requiring appellant to testify. "On appeal, this court will not
second-guess an attorney's tactical decisions where they relate to trial
strategy and are within the attorney's discretion." As the district court
correctly noted, trial counsel reasonably decided to allow admission of
appellant's statement in order to present appellant's version of events.
Therefore, the district court did not err in denying this claim.

18 (Exhibit 147, at pp. 6-8) (footnotes and citations omitted). The Nevada Supreme Court denied relief,
19 finding that petitioner failed to demonstrate that his counsel was deficient and failed to demonstrate
20 that he was prejudiced by trial counsel's alleged errors. The factual findings of the state court are
21 presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that
22 the state court's ruling was contrary to, or involved an unreasonable application of, clearly
23 established federal law, as determined by the United States Supreme Court, or that the ruling was
24 based on an unreasonable determination of the facts in light of the evidence presented in the state
25 court proceeding. This Court denies habeas relief as to Ground Two (4).
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1 **5. Ground Two (5)**

2 Petitioner alleges that his counsel was ineffective for failing to request a psychological
3 evaluation of the victim. Following an evidentiary hearing on the claims raised in the state habeas
4 petition, the state district court found that petitioner presented no evidence or witnesses, other than
5 his own testimony, to prove his claims. The state district court denied the claim that counsel should
6 have requested a psychological evaluation of the victim before or during trial. (Exhibit 133, at p. 2).
7 The Nevada Supreme Court considered and rejected petitioner's claim on appeal, as follows:

8 Twelfth, appellant claimed that his trial counsel was ineffective for
9 failing to request a psychological evaluation of the victim based on the
10 fact that she was an alcoholic, who had admitted to having blackouts,
11 who could not remember the actual assault, and had made inconsistent
12 statements regarding the assault. Appellant further claimed that the
13 victim gave inconsistent statements about the sexual assault, which
14 indicates psychological instability and that it was constitutional error
15 not to request an independent psychological evaluation of the victim.
Appellant failed to demonstrate that trial counsel's performance was
deficient or that he was prejudiced. Appellant failed to demonstrate
that a request for a psychological evaluation would have been
successful. Appellant also failed to state what evidence would have
been produced by the psychological evaluations that would have
changed the outcome of the trial. Therefore, the district court did not
err in denying this claim.

16 (Exhibit 147, at p. 8) (footnotes and citations omitted). The Nevada Supreme Court denied relief,
17 finding that petitioner failed to demonstrate that his counsel was deficient and failed to demonstrate
18 that he was prejudiced by trial counsel's alleged error. The factual findings of the state court are
19 presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that
20 the state court's ruling was contrary to, or involved an unreasonable application of, clearly
21 established federal law, as determined by the United States Supreme Court, or that the ruling was
22 based on an unreasonable determination of the facts in light of the evidence presented in the state
23 court proceeding. This Court denies habeas relief as to Ground Two (5).

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1 **6. Ground Two (6)**

2 Petitioner claims that his counsel, Robert Bell, failed to arrange for him to undergo a
3 polygraph examination. Following the post-conviction evidentiary hearing, the state district court
4 held that: “Counsel reasonably did not seek a polygraph test for petitioner since such tests are not
5 admissible; and petitioner failed to show any prejudice from the absence of such a test.” (Exhibit
6 133, at p. 3). The Nevada Supreme Court considered and rejected petitioner’s claim, as follows:

7 Eighth, appellant claimed that his trial counsel was ineffective for
8 failing to have a polygraph test performed on appellant to demonstrate
9 his innocence. Appellant failed to demonstrate that his trial counsel’s
10 performance was deficient. The results of the polygraph examination
11 are not admissible unless both parties have signed a written stipulation
12 to that effect. Appellant did not demonstrate that the results of a
13 polygraph examination would have been both favorable and admissible
14 such that his counsel acted objectively unreasonable in failing to
15 arrange for one. Thus, the district court did not err in denying the
16 claim.

17 (Exhibit 147, at p. 6) (footnotes and citations omitted). The Nevada Supreme Court denied relief,
18 finding that petitioner failed to demonstrate that his counsel was deficient and failed to demonstrate
19 that he was prejudiced by trial counsel’s alleged error. The factual findings of the state court are
20 presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that
21 the state court’s ruling was contrary to, or involved an unreasonable application of, clearly
22 established federal law, as determined by the United States Supreme Court, or that the ruling was
23 based on an unreasonable determination of the facts in light of the evidence presented in the state
24 court proceeding. This Court denies habeas relief as to Ground Two (6).

25 **7. Ground Two (7)**

26 Petitioner claims that his counsel, Robert Bell, began his opening arguments with a statement
that implied that petitioner committed a rape. The state district court denied the claim, finding that:
“Counsel did not concede petitioner’s guilt in [the] opening statement. Counsel was merely trying to
explain to the jury that the State had unreasonably charged a consensual sexual encounter as a sexual

1 assault.” (Exhibit 133, at p. 3). On appeal from the denial of the state habeas petition, the Nevada
 2 Supreme Court considered and rejected petitioner’s claim, as follows:

3 Fourteenth, appellant claimed his trial counsel was ineffective for
 4 beginning his opening statement with the following statement:
 5 “Evidence will show that it goes all of a sudden from a nice, fun, time
 6 kissing, hugging, to choking, to rape, due to [the victim’s] alcoholic
 7 condition.” Appellant argued that this statement implied that he
 8 actually committed the rape. Appellant failed to demonstrate that he
 9 was prejudiced. When the statement is read in context with the
 10 entirety of trial counsel’s opening statement, it is clear that trial
 11 counsel was attempting to imply that the victim had engaged in a
 consensual sexual encounter and then the victim alleged a sexual
 assault. Importantly, the jury was admonished that none of the
 statements made by counsel in opening statements should be
 considered as evidence in the case. Moreover, the defense appellant
 presented at trial made it plain that appellant did not concede his guilt;
 rather, appellant contended throughout the trial that he had engaged in
 consensual sexual relations with the victim. Therefore, the district
 court did not err in denying this claim.

12 (Exhibit 147, at pp. 9-10) (footnotes and citations omitted, quotation in original). The factual
 13 findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to
 14 meet his burden of proving that the state court’s ruling was contrary to, or involved an unreasonable
 15 application of, clearly established federal law, as determined by the United States Supreme Court, or
 16 that the ruling was based on an unreasonable determination of the facts in light of the evidence
 17 presented in the state court proceeding. This Court denies habeas relief as to Ground Two (7).

18 **8. Ground Two (8)**

19 Petitioner claims that after Rebecca Morgan testified, the prosecutor related that there was a
 20 stipulation regarding her statement. Petitioner claims that he did not enter into a stipulation and that
 21 he told his counsel, Robert Bell, that Morgan never made such statements and that the statements
 22 were false. The state district court denied this claim, finding that, at the evidentiary hearing,
 23 “petitioner presented no evidence or witnesses, other than this own testimony, to prove his claims.”
 24 (Exhibit 133, at p. 2). The Nevada Supreme Court considered and rejected petitioner’s claim, as
 25 follows:

1 Fifteenth, appellant claimed that his trial counsel was ineffective for
2 entering into a stipulation, which involved the admission of a
3 statement made by appellant's ex-girlfriend, without appellant's
4 permission. Appellant claimed that when the stipulation was read in
5 court, he told his trial counsel that his ex-girlfriend had never made the
6 statements that were being admitted into evidence. Appellant claimed
7 that he argued with his trial counsel about the admission of this
8 "hearsay testimony." Appellant failed to demonstrate that trial
9 counsel's performance was deficient or that he was prejudiced. At the
10 evidentiary hearing, appellant failed to present any witnesses to verify
11 that the statements in the stipulation were incorrect. Thus, appellant
12 failed to demonstrate that the reading of the stipulation altered the
13 outcome of his trial. Therefore, the district court did not err in denying
14 this claim.

15 (Exhibit 147, at p. 10) (footnotes and citations omitted). The factual findings of the state court are
16 presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that
17 the state court's ruling was contrary to, or involved an unreasonable application of, clearly
18 established federal law, as determined by the United States Supreme Court, or that the ruling was
19 based on an unreasonable determination of the facts in light of the evidence presented in the state
20 court proceeding. This Court denies habeas relief as to Ground Two (8).

21 **9. Ground Two (9)**

22 Petitioner claims that his counsel failed to object to Timothy Ahern's testimony that he met
23 petitioner when petitioner was released from prison. The Nevada Supreme Court considered and
24 rejected petitioner's claim, as follows:

25 Sixteenth, appellant claimed that trial counsel was ineffective for
26 failing to object to Timmy Ahern's testimony that he had met appellant
when appellant was released from prison in 1992 or 1993, even though
this statement revealed that appellant had prior convictions. Appellant
failed to demonstrate that he was prejudiced. After Timmy Ahern
testified at trial, the jury asked if they could be told what crime
appellant had previously committed. The district court indicated that it
thought that either a mistrial or an admonishment was appropriate and
thoroughly canvassed appellant to determine if he wished to move for
a mistrial. Appellant's trial counsel indicated that he would prefer an
admonishment and a limiting instruction. The district court then asked
appellant whether he agreed to this approach, and appellant asked the
district court to put the matter into layman's terms. The court
explained that a mistrial would result in a new trial. The district court
further explained that it could not express any opinion on the weight of

1 the evidence or the credibility of the witnesses. The district court then
2 gave appellant time to discuss the matter with his trial counsel and
3 after this discussion appellant stated that he did not want a mistrial. As
4 a result, the district court continued with the trial, but admonished the
5 jury that it should disregard any reference to appellant's prior prison
6 sentence. Thus, the district court took appropriate steps to cure any
7 prejudice to appellant on this matter. Appellant was fully informed
8 regarding the nature of the motion for a mistrial and offered a
9 knowing, intelligent, and voluntary waiver. Therefore, the district
10 court did not err in denying this claim.

11 (Exhibit 147, at pp. 10-11) (footnotes and citations omitted). The factual findings of the state court
12 are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving
13 that the state court's ruling was contrary to, or involved an unreasonable application of, clearly
14 established federal law, as determined by the United States Supreme Court, or that the ruling was
15 based on an unreasonable determination of the facts in light of the evidence presented in the state
16 court proceeding. This Court denies habeas relief as to Ground Two (9).

17 **10. Ground Two (10)**

18 Petitioner claims that his counsel, Robert Bell, failed to present a defense for him, and that
19 the only defense was cross-examination of the State's witnesses. The state district court denied this
20 claim following the evidentiary hearing, finding that "petitioner presented no evidence or witnesses,
21 other than this own testimony, to prove his claims." (Exhibit 133, at p. 2). The Nevada Supreme
22 Court considered and rejected petitioner's claim, as follows:

23 Seventeenth, appellant claimed that trial counsel was ineffective for
24 failing to present Rebecca Morgan, Sharon Brown, Hugh Ahern,
25 Sandra Hranko, Robert Myers, and Kenneth Theall as witnesses.
26 Appellant failed to demonstrate that trial counsel's performance was
deficient or that he was prejudiced. At the evidentiary hearing
appellant failed to present any evidence or witnesses to demonstrate
that these witnesses would have testified at trial consistently with his
claims. Thus, appellant failed to show that the presentation of these
witnesses would have changed the outcome of the trial. Therefore, the
district court did not err in denying the claim.

(Exhibit 147, at pp. 11-12) (footnotes and citations omitted). The factual findings of the state court

1 are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving
2 that the state court's ruling was contrary to, or involved an unreasonable application of, clearly
3 established federal law, as determined by the United States Supreme Court, or that the ruling was
4 based on an unreasonable determination of the facts in light of the evidence presented in the state
5 court proceeding. This Court denies habeas relief as to Ground Two (10).

6 **11. Ground Two (11)**

7 Petitioner claims that his appellate counsel was ineffective for failing to challenge the
8 sufficiency of the evidence, and for failing to challenge prosecutorial misconduct, specifically,
9 inducing Ahern to testify that he met petitioner when he was released from prison.

10 The *Strickland* standard applies to challenges of effective appellate counsel. *Smith v.*
11 *Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel has no constitutional duty to raise every non-
12 frivolous issue requested by the client. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983).

13 The Nevada Supreme Court considered and rejected petitioner's claim, as follows:

14 First, appellant claimed that his trial counsel was ineffective for failing
15 to raise the issue of sufficiency of the evidence on appeal. Appellant
16 failed to demonstrate that this issue had a reasonable probability of
17 success on appeal. Our review of the record reveals sufficient
18 evidence from which a rational jury could find appellant guilty of
19 sexual assault beyond a reasonable doubt. The victim testified that
20 appellant sexually assaulted her in a storage shed. The victim reported
21 the sexual assault immediately after the incident occurred. Moreover,
22 the victim was found by the police a very short distance from the
23 storage shed where the sexual assault occurred. Timmy Ahern testified
24 that he heard a female voice crying for help inside the shed and that
25 appellant had reassured him that everything was okay. The SART
26 nurse, Titus, testified that the victim's injuries were consistent with
sexual assault and that there was seminal fluid found in the victim's
vagina. Thus, the evidence adduced at trial indicates that a challenge
to the sufficiency of the evidence would not have had a reasonably
probability of success on appeal. Therefore, the district court did not
err in denying appellant's claim.

Second, appellant claimed that his appellate counsel was ineffective
for failing to raise a claim of prosecutorial misconduct because the
prosecutor purposefully elicited testimony regarding appellant's prior
conviction. Appellant failed to demonstrate that his appellate counsel
was deficient or that he was prejudiced. Notably, after Ahern

1 referenced appellant's prior prison sentence at trial, the district court
2 canvassed the prosecuting attorney to determine if she had
3 purposefully elicited evidence of appellant's prior incarceration. The
4 prosecutor indicated that she had previously warned Ahern not to
5 testify about appellant's prior prison sentence. At the evidentiary
6 hearing, appellant failed to present any evidence supporting his claim
7 that the prosecutor purposefully elicited this testimony. Thus,
8 appellant failed to demonstrate that this issue would have had a
9 reasonable probability of success on appeal. Therefore, the district
10 court did not err in denying appellant's claim.

11 (Exhibit 147, at pp. 12-14) (footnotes and citations omitted). The Nevada Supreme Court cited to
12 and applied the correct federal standard for ineffective assistance of appellate counsel, *Strickland v.*
13 *Washington*, 466 U.S. 668 (1984) and *Jones v. Barnes*, 462 U.S. 745, 751 (1983). (Exhibit 147, at p.
14 12). The Nevada Supreme Court denied relief, finding that petitioner failed to demonstrate that his
15 counsel was deficient and failed to demonstrate that he was prejudiced by appellate counsel's alleged
16 errors. The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1).
17 Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or
18 involved an unreasonable application of, clearly established federal law, as determined by the United
19 States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in
20 light of the evidence presented in the state court proceeding. This Court denies habeas relief as to
21 Ground Two (11).

22 **C. Ground Three**

23 Petitioner alleges that he was subjected to cruel and unusual punishment because he was
24 sentenced to life without the possibility of parole. The state district court dismissed petitioner's
25 claim that his sentence constitutes cruel and unusual punishment. The state district court ruled that
26 petitioner's sentencing argument was conclusory and without any specific factual support. (Exhibit
119; Exhibit 133, at pp. 1-2). With lengthy analysis in the order filed January 28, 2004, the Nevada
Supreme Court considered and rejected petitioner's claim on direct appeal. (Exhibit 94). The
Nevada Supreme Court held:

1 In the instant case, Hawes does not allege that the district court relied
2 on palpable or highly suspect evidence or that the relevant statutes
3 are unconstitutional, and he cannot demonstrate that the sentence was
4 so unreasonably disproportionate to the crime as to shock the
5 conscience. We note that the sentence imposed was within the
parameters provided by the relevant statutes. Further, Hawes cannot
demonstrate that the district court failed to understand its sentencing
authority and exercise discretion in deciding to adjudicate him as a
habitual criminal.

6 The district court conducted a hearing and considered: (1) the
7 arguments of defense counsel and the State; (2) witnesses testifying in
support of Hawes; (3) Hawes' remorseless statement in allocution; (4)
8 the presentence investigation report (PSI) prepared by the Division of
Parole and Probation detailing Hawes' extensive violent and criminal
9 history; (5) and the facts of the instant offense. The district court
expressly stated on the record that "the defendant, Gary Eugene
10 Hawes, is an habitual criminal and such [a] declaration would best
serve the purpose of discouraging this defendant from further
11 committing and repeating offending acts of criminal conduct." The
district court also filed an order with particularized findings of fact and
conclusions of law, thereby adjudicating Hawes as a habitual criminal.

12 Finally, we note that in addition to Hawes' 6 previous felony
13 convictions, the PSI listed 5 misdemeanor convictions, 2 arrests
without a recorded disposition, and several revoked terms of parole
14 and probation spanning approximately 20 years across 3 different
states. Accordingly, we conclude that the district court did not abuse
15 its discretion at sentencing, and the sentence imposed was not
disproportionate to the crime and does not constitute cruel and unusual
16 punishment under either the federal or state constitution.

17 (Exhibit 94, at pp. 3-5) (footnotes and citations omitted). In considering this claim on direct appeal,
18 the Nevada Supreme Court noted that the Eighth Amendment does not require strict proportionality
19 between the crime and sentence, but forbids only an extreme sentence that is "grossly
20 disproportionate" to the crime. *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991). (Exhibit 94,
21 at pp. 2-3).

22 In *Harmelin*, the United States Supreme Court determined that the imposition of a mandatory
23 life sentence without the possibility of parole did not violate the Eighth Amendment. The Court
24 announced that "[t]he Eighth Amendment contains no proportionality guarantee." *Harmelin*, 501
25 U.S. at 965. While an earlier United States Supreme Court case, *Solem v. Helm*, 463 U.S. 277
26

(1983), suggests that courts should invoke a proportionality test, and should compare a defendant's sentence to others within the jurisdiction for similar crimes, *Harmelin* makes clear that such comparative analysis need not be performed unless the sentence imposed "gives rise to an inference of gross disproportionality." *Harmelin*, 501 U.S. at 1005. Other United States Supreme Court cases dictate upholding defendants' sentence, even where the sentence seems harsh in light of the offense committed. *Rummel v. Estelle*, 445 U.S. 263 (1980) (life sentence upheld where defendant was repeated offender and committed third felony of stealing \$120); *Hutto v. Davis*, 454 U.S. 370 (1982) (40-year prison sentence upheld where defendant was convicted of possession with intent to sell nine ounces of marijuana); *Ewing v. California*, 538 U.S. 11 (2003) (upholding 25-year sentence of habitual criminal defendant for stealing three golf clubs, holding that the states may dictate how they wish to deal with recidivism issues).

The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The Nevada Supreme Court made a reasonable application of federal law. (Exhibit 94, at pp. 2-5). The sentence imposed was within statutory limits and is not grossly disproportionate to the crimes for which petitioner was convicted. Petitioner's sentencing was not a violation of his Eighth Amendment protections against cruel and unusual punishment. Ground Three of the petition is denied.

D. Ground Four

Petitioner refers to a supplemental state post-conviction petition. The claim is: "Petitioner respectfully submits that his trial counsel was ineffective in that he should have moved for a mistrial owing to the mention by the prosecution witness that Mr. Hawes had been in prison and jail." (Exhibit 114, at p. 1). The state district court dismissed petitioner's claim that his counsel was

1 ineffective for failing to move for a mistrial. The court determined that petitioner had specifically
2 decided not to move for mistrial because during trial, the court specifically canvassed petitioner as to
3 whether he wanted to move for a mistrial when a witness testified that petition had been in prison,
4 and petitioner told the court that he did not want a mistrial. (Exhibit 119). The Nevada Supreme
5 Court considered and rejected petitioner's claim, as discussed earlier in this order. (Exhibit 147, at
6 pp. 10-11). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1).
7 Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or
8 involved an unreasonable application of, clearly established federal law, as determined by the United
9 States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in
10 light of the evidence presented in the state court proceeding. This Court denies habeas relief as to
11 Ground Four.

12 **E. Ground Five**

13 Petitioner refers to a supplemental state post-conviction petition, which includes this claim:
14 "The manner in which petitioner was adjudicated a habitual criminal violated his constitutional
15 rights under United States Supreme Court precedent. The petitioner was denied his constitutional
16 right to have his enhanced sentence determined by a jury of his peers, not a sentencing court."
17 Petitioner contends that he is entitled to a new sentencing hearing conducted before a jury, because
18 the procedure in place for habitual criminal adjudication violated *Apprendi v. New Jersey*, 530 U.S.
19 466 (2000). This claim was procedurally defaulted during review at the Nevada Supreme Court.

20 **1. Procedural Default Principles**

21 "Procedural default" refers to the situation where a petitioner in fact presented a claim to the
22 state courts but the state courts disposed of the claim on procedural grounds, instead of on the merits.
23 A federal court will not review a claim for habeas corpus relief if the decision of the state court
24 regarding that claim rested on a state law ground that is independent of the federal question and
25 adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).
26

1 The *Coleman* Court stated the effect of a procedural default, as follows:

2 In all cases in which a state prisoner has defaulted his federal claims in
3 state court pursuant to an independent and adequate state procedural
4 rule, federal habeas review of the claims is barred unless the prisoner
5 can demonstrate cause for the default and actual prejudice as a result of
6 the alleged violation of federal law, or demonstrate that failure to
7 consider the claims will result in a fundamental miscarriage of justice.

8 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural
9 default doctrine ensures that the state's interest in correcting its own mistakes is respected in all
10 federal habeas cases. *See Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003). Federal review
11 will be barred as long as the state court relied on the procedural bar as a separate basis for its
12 decision, even if the state court also discussed the merits of the claim in an alternative holding. *See*
13 *Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir. 2000).

14 **2. Ground Five was Procedural Defaulted in State Court on Independent and** 15 **Adequate State Grounds**

16 In Ground Five, petitioner claims: "The manner in which petitioner was adjudicated a
17 habitual criminal violated his constitutional rights under United States Supreme Court precedent.
18 The petitioner was denied his constitutional right to have his enhanced sentence determined by a jury
19 of his peers, not a sentencing court." Petitioner raised this same claim in a supplement to his state
20 habeas petition. On appeal from the denial of petitioner's state habeas petition, the Nevada Supreme
21 Court found this claim procedurally defaulted. The Nevada Supreme Court cited NRS
22 34.810(1)(b)(2), holding that: "Appellant's claim is outside the scope of claims permissible in a
23 petition for a writ of habeas corpus." (Exhibit 147, at p. 14). The Ninth Circuit Court of Appeals
24 has held that, at least in non-capital cases, application of the procedural bar at issue in this case --
25 NRS 34.810 -- is an independent and adequate state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-
26 75 (9th Cir. 2003); *see also Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9th Cir. 1999).

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3. Cause and Prejudice

To demonstrate cause for a procedural default, the petitioner must be able to “show that some *objective factor external to the defense* impeded” his efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to exist, the external impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991). Ineffective assistance of counsel may satisfy the cause requirement to overcome a procedural default. *Murray*, 477 U.S. at 488. However, for ineffective assistance of counsel to satisfy the cause requirement, the independent claim of ineffective assistance of counsel, itself, must first be presented to the state courts. *Murray*, 477 U.S. at 488-89. In addition, the independent ineffective assistance of counsel claim cannot serve as cause if that claim is procedurally defaulted. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

With respect to the prejudice prong of cause and prejudice, the petitioner bears:

the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.

White v. Lewis, 874 F.2d 599, 603 (9th Cir. 1989), *citing United States v. Frady*, 456 U.S. 152, 170 (1982). If the petitioner fails to show cause, the court need not consider whether the petitioner suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d 528, 530 n.3 (9th Cir. 1988).

In the instant case, petitioner has not addressed the issue of procedural default and has not asserted any reason for his failure to properly raise this claim on direct appeal. Neither the petition itself, nor petitioner’s other filings address the procedural default of Ground Five or assert any argument of cause and prejudice to excuse the procedural default. This Court finds that Ground Five of the petition was procedurally defaulted in state court.

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1 **4. *Apprendi* Claim Fails on the Merits**

2 Even if this Court reached the *Apprendi* claim on the merits, the claim would fail, as
3 discussed *supra*, in this Court's analysis of Ground One. There is no clearly established federal law,
4 as determined by the United States Supreme Court, that requires petitioner to have been provided a
5 jury to determine whether he should have been adjudicated a habitual criminal under Nevada's
6 habitual criminal statute. Petitioner has failed to meet his burden of proving that the Nevada
7 Supreme Court's decision was contrary to, or involved an unreasonable application of, clearly
8 established federal law, as determined by the United States Supreme Court, or that it was based on an
9 unreasonable determination of the facts in light of the evidence presented in the state court
10 proceeding. As such, petitioner is not entitled to habeas relief on this claim.

11 **V. Certificate of Appealability**

12 In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28
13 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
14 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
15 petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a
16 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
17 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's
18 assessment of the constitutional claims debatable or wrong." *Id.* (*quoting Slack*, 529 U.S. at 484). In
19 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
20 debatable among jurists of reason; that a court could resolve the issues differently; or that the
21 questions are adequate to deserve encouragement to proceed further. *Id.* This Court has considered
22 the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a
23 certificate of appealability, and determines that none meet that standard. The Court will therefore
24 deny petitioner a certificate of appealability.

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1 **VI. Conclusion**

2 **IT IS THEREFORE ORDERED** that petitioner's motion for the appointment of counsel
3 (ECF No. 26) is **DENIED**.

4 **IT IS FURTHER ORDERED** that petitioner's motion for a status check (ECF No. 25) is
5 **DENIED AS MOOT**.

6 **IT IS FURTHER ORDERED** that the petition for a writ of habeas corpus (ECF No. 6) is
7 **DENIED IN ITS ENTIRETY**.

8 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
9 **APPEALABILITY**.

10 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
11 **ACCORDINGLY**.

12 Dated this 7th day of July, 2011.

13 
14 UNITED STATES DISTRICT JUDGE
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